

BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
STATE OF CALIFORNIA

In the Matter of:

LUCIA MAR UNIFIED SCHOOL DISTRICT,

v.

PARENTS ON BEHALF OF STUDENT.

OAH Case No. 2017020299

DECISION

Lucia Mar Unified School District filed a due process hearing request (complaint) with the Office of Administrative Hearings, State of California, on February 7, 2017, naming Parents on behalf of Student.

Administrative Law Judge Alexa J. Hohensee heard this matter in Arroyo Grande, California on March 7, 2017.

Peter Sansom, Attorney at Law, represented District. Paul Fawcett, District's Director of Special Education, attended the hearing on behalf of District.

Parents represented Student and attended and testified at the hearing on behalf of Student.

A continuance was granted for the parties to file written closing arguments until March 24, 2017. Upon receipt of the written closing arguments,¹the record was closed and the matter was submitted for decision.

¹Student requested and was given the opportunity to make both oral and written closing argument. Student's closing brief was filed on March 27, 2017, and his legal

ISSUE²

May Lucia Mar Unified School District assess Student pursuant to the August 31, 2016, and October 13, 2016, assessment plans over the objection of Parents?

SUMMARY OF DECISION

District met its burden of proof on the issue of its right to conduct behavioral, psycho educational (social, emotional and adaptive functioning), and health assessments of Student. Student's increasing absences, and Parents' report that Student was too anxious to attend school and had gastrointestinal issues requiring toileting support, were conditions that warranted the proposed assessments. District gave Parents proper notice of proposed assessments, and Parents were given 15 days or more to review, sign and return the assessment plans. Accordingly, this Decision authorizes District to conduct the proposed assessments without parental consent.

FACTUAL FINDINGS

1. Student was a nine-year-old boy and in second grade at the time of the hearing. Student has resided with Parents within District's boundaries at all relevant times.

arguments were considered. The ALJ did not consider factual information referenced in Student's closing brief that was not admitted into evidence at the hearing.

² District served and filed a withdrawal of Issue 2 of the complaint with OAH on March 2, 2017. The ALJ has authority to redefine a party's issues, so long as no substantive changes are made. (*J.W. v. Fresno Unified School Dist.* (9th Cir. 2010) 626 F.3d 431, 442-443.)

2. Student is a bright young man with a diagnosis of autism spectrum disorder. He is eligible for special education under the categories of autism and specific learning disability.

2015-2016 SCHOOL YEAR

3. During the 2015-2016 school year, Student was in first grade and attended general education classes. Student received specialized academic instruction to address reading and comprehension, and occupational therapy to address muscle tone and balance. He received speech therapy to address social language and social communication skills. In addition, Student worked on a behavior goal to increase frustration tolerance and a toileting goal to independently request to use the restroom.

4. Parents increasingly kept Student home from school during the Spring 2016 semester. Parents provided District with a doctor's letter that Student was having gastrointestinal problems that might impact his attendance.

5. Student was also frequently tardy. Parents provided District a letter from Children's Hospital of Los Angeles (CHLA) explaining that Student had a sleep disorder, and after a bad night Mother would let Student sleep in and arrive to school late.

6. District convened Student's annual individualized education program team meeting on May 27, 2016.

7. Parents reported their concerns to the IEP team, including as relevant here, Student's ongoing absences due to gastrointestinal issues and his tardiness due to insomnia. Parents also stated that Student was having toileting accidents at home, and had an in-home behaviorist to address toileting issues.

8. Student's teacher reported that Student had made progress on his toileting goal. Student was independently asking to use the restroom during natural breaks in the school day, and washing his hands afterwards. Student was not having any toileting accidents at school. Parents responded that they were worried that Student

was constipated at school, and requested that he be escorted to a separate bathroom in the nurse's office so that school staff could look in the toilet to confirm whether Student had voided. District IEP team members believed Parents' proposal would single Student out from among his classmates and be socially awkward. The IEP team tabled Parent's request for later discussion, and after discussion of other matters, the IEP team adjourned the meeting to be reconvened on June 1, 2016.

9. On June 1, 2016, Student's IEP team meeting was reconvened. The team developed and adopted goals in the areas of academics, fine motor control (writing), expressive language, social skills, behavior (learning coping strategies) and gross motor skills. District offered Student placement in general education, with continued specialized academic instruction, occupational therapy, speech therapy, and access to an instructional assistant during unstructured school activities (recess, lunch).

10. The IEP team discussed Student's absences, and concluded that a functional behavior assessment was necessary to determine if there was a behavioral component to Student's resistance to going to school and using the bathroom. District had not conducted a functional behavior assessment of Student within the past year. District members of the IEP team decided that the behavioral assessment should be performed at the beginning of the 2016-2017 school year to address behaviors that impacted Student's access to school and in the classroom environment. The IEP team meeting was concluded, and District proposed to convene a meeting early in the 2016-2017 school year to discuss the results of the functional behavior assessment, toileting issues and addition of home instruction if absences continued.

2016-2017 SCHOOL YEAR

11. On September 7, 2016 District sent Parents a letter that proposed to have Dr. Randal Ball, a doctoral level board certified behavioral analyst, conduct the functional behavior assessment. The letter explained that Dr. Ball would observe Student's behavior

in school with his current behavior supports and conduct a functional behavior assessment of his transition to school. The functional behavior assessment would focus on Student's behaviors once he left the house, and during transportation and transitions from Parent's car to the classroom.

12. District's letter included a proposed assessment plan, dated August 31, 2016. The assessment plan was in English, the native language of Parents and Student. The plan identified behavior as the area to be assessed and gave a brief, clear description of the proposed assessment, to include observations of Student's behavior during transitions to school and in the school setting, record review and interviews. The September 7, 2016 letter also included a copy of parental procedural rights, and a statement that no IEP would result from the assessment without parental consent. It requested Parents' consent to the assessment and to the June 1, 2016 IEP.

13. Dr. Ball testified at hearing. His demeanor was professional, and his responses were informative and insightful. Dr. Ball had a doctorate of education in counseling and educational psychology, and was a doctoral level board certified behavioral analyst with decades of experience in conducting special education functional analyses and functional behavior assessments. He had assessed students on the autism spectrum, and opined that they may display school avoidance behaviors. Dr. Ball had not assessed Student, but had conducted a review of documents and information already possessed by District.³

³At hearing, Parents objected to Dr. Ball's review of Student's documents because they had not consented to the functional behavior assessment. However, school districts do not need to obtain parental consent before reviewing a student's existing data. (*Letter to Anonymous* (OSEP Feb. 6, 2007) 48 IDELR 136, 107 LRP 45732.)

14. Dr. Ball explained that a functional behavior assessment identifies triggers of behavior, theorizes the reinforcement for the behavior, and plans the reduction of behaviors through learning more appropriate replacement behaviors. A functional behavior assessment is done in the environment in which the behaviors are exhibited. In addition to records review and interviews, Dr. Ball's proposed assessment of Student would have included observation of Student at home getting ready for school, during transportation, during arrival at school, and in the classroom. Dr. Ball opined that District's proposal to conduct a functional behavior assessment of Student was appropriate when offered. He also opined that, in light of Parents' subsequent reports of Student's health issues and anxiety, it was appropriate in October 2016 for District to concurrently conduct limited psycho educational and health assessments. A psycho educational assessment of Student's social, emotional and adaptive functioning would determine if there was a social or emotional component contributing to the school avoidance behavior, such as anxiety. A health assessment would alert the assessors to medical factors that might play a role in Student's behavior. Dr. Ball was extremely well-qualified to conduct a functional behavior assessment of Student. His opinions were very persuasive and accorded significant weight.

15. On September 12, 2016, Parents provided District with a copy of a private functional behavior assessment of Student prepared in May 2016. That report was based primarily upon observations made in Student's home in late 2015, and observations at Student's school in May 2016. The private assessor observed that school staff used subtle hand gestures to prompt Student to use the restroom at natural transitions such as recess and lunch. However they did not enter the restroom with Student to confirm whether he actually voided, wiped, flushed and washed his hands. The assessor recommended further assessment of Student's toileting needs in order to create a "data-driven, comprehensive" toileting program.

16. On September 26, 2016, Parents sent District a letter consenting to implementation of the June 1, 2016 IEP, but disagreeing that the IEP offered a FAPE. Parents believed that Student had unique educational needs that had not yet been identified or assessed.

17. On October 3, 2016, Parents sent District a letter objecting to various District actions, including among others: that District had not conducted assessments of Student in all areas of suspected disability; that District had not offered a comprehensive functional behavior assessment to identify "each of the biological, social, affective and/or environmental" factors that impeded Student's learning; that District had not responded to Parents' request for a data-driven behavior plan for toileting; and that District did not offer Student placement in home instruction for his "disability-related absences." Parents also complained that the proposed functional behavior assessment by Dr. Ball did not meet regulatory requirements, although they did not specify which regulations had not been met.

18. By October 13, 2016, Student had missed 10 days of the 2016-2017 school year, and had arrived late nine times.

19. On October 13, 2016, in response to Parents' request for preparation of a toileting plan, District nurse Claire Lockwood emailed releases of medical information to Parents to sign to allow District to contact Cottage Hospital, CHLA and Student's physicians regarding Student's medical conditions affecting attendance. Ms. Lockwood had obtained the release forms required by these medical facilities, because she was aware that those facilities required their own forms and would not honor District release forms. She asked that Parents bring the signed releases to an IEP team meeting scheduled for the next day.

20. Ms. Lockwood was the nurse assigned to Student's school. Ms. Lockwood was a licensed registered nurse and California public health nurse. She had been a

school nurse for six years, and had previously worked for five years in a pediatrics practice. Ms. Lockwood had attended Student's May 27 and June 1, 2016 IEP team meetings and was familiar with Student and his educational needs. She understood that Student was receiving care from Cottage Hospital and CHLA for bowel issues. Ms. Lockwood testified credibly at hearing, and her responses to questions were thorough and informative.

21. In order to identify the health care needs of Student and understand how those needs impacted access to curriculum, Ms. Lockwood explained that it was necessary to consult with Student's health care providers. For instance, Student might need time in the mornings to have bowel movements. Student might otherwise suffer from impacted bowels that would cause pain and make it difficult for him to attend and focus in the classroom. In Ms. Lockwood's opinion, drafting a plan to address a student's health care needs without consulting with the medical professionals who understood those needs would be below the standard of care for a school nurse and would amount to no more than an irresponsible "shot in the dark." She persuasively explained that in light of Parents' report that Student's absences were due to gastrointestinal difficulties, including possible impacted bowels, she would have to speak with Student's gastroenterologists and physicians regarding how Student's medical needs in these area might impact access to his educational program, and how those needs could be addressed in the school setting. Ms. Lockwood was qualified to conduct a health assessment of Student, and her opinions were given significant weight.

22. On October 14, 2016, District convened an IEP team meeting. Student's home behaviorist attended the meeting, and informed the team that she was working with Student on a toileting routine two days per week.

23. Parents reported that Student had told them he did not want to use the bathroom at school. They kept Student home on days when he could not void in the

morning because they were concerned that District did not support Student's biological needs. District team members agreed to amend the June 1, 2016 IEP to provide Student with three hours of in-home instruction for every two days of absences related to his bowel movements. They also agreed to amend Student's IEP to have Student's aide accompany him throughout the school day, have Student use a single stall bathroom, have District collect data on whether Student urinated or passed a bowel movement at school, and coordinate with Student's in-home behaviorist on toileting. District team members recommended that the school nurse communicate with the medical professionals familiar with Student's toileting needs to ensure that District did not act against medical advice. However, Parents did not consent at the meeting to a functional behavior assessment for Student's home to school transition or the release of medical information.

24. On October 14, 2016, after the IEP team meeting, District sent Parents a letter explaining that in light of the concerns expressed by Parents at the IEP team meeting, it wanted to take a three-pronged approach to assessing Student's educational needs regarding absences and toileting, to include behavioral, social/emotional/adaptive and medical components. The letter attached an assessment plan dated October 13, 2016, stating that District proposed, in addition to the functional behavior assessment that had been proposed in the August 31, 2016 assessment plan, assessments of: social, emotional and behavioral functioning by a school psychologist; adaptive behavior by a school psychologist; and health and developmental history by the school nurse; with observations in the school setting and record review and interviews. The assessment plan was in English, and contained a brief, clear textual explanation of each assessment. The social/emotional/behavior assessment would assess how Student got along with other people and coped with situations, and measure affective functioning and self-regulation. The adaptive behavior assessment

would assess what Student could do for himself related to day to day living and independent life skills. District also requested Parents' signature on the August 31, 2016 assessment plan, included a copy of parental procedural safeguards, and informed Parents an IEP would not result from the assessments without parental consent.

25. Ashley Kieffe, a credentialed school psychologist assigned to Student's school, testified at hearing. Ms. Kieffe had assessed Student in the first grade in the areas of auditory processing, academics and reading, and had attended Student's May 27, June 1, and October 14, 2016 IEP team meetings. She had a professional demeanor, and her testimony was straightforward and credible.

26. In Ms. Kieffe's opinion, the information received during the first months of the 2016-2017 school year warranted a reevaluation of Student for social, emotional and adaptive functioning to determine if there was a social, emotional or adaptive component to Student's refusal to get ready for school or use the school bathroom. The June 1, 2016 IEP team had arranged for Student to transition into second grade by having Parents and Student visit the school before the 2016-2017 school year began, meet the teacher, and acclimate to the classroom. However, Ms. Kieffe opined that by October 2016 it was clear that Student might be experiencing some anxiety as part of his school refusal. Ms. Kieffe was qualified to conduct assessments of Student's social, emotional and adaptive functioning, and her opinion that circumstances warranted such an evaluation from District was persuasive.

27. On October 17, 2016, Parents responded to District in a letter refusing to consent to the proposed assessments. Parents explained that they believed Student's health and developmental history were adequately documented, that District staff was insufficiently familiar with autism to conduct assessments of their son, and that District had received consent to assess Student in 2013 but failed to do so. Parents enclosed signed District general releases of medical information forms prepared by Mother

(rather than the facility-specific forms provided by Ms. Lockwood) permitting District to contact one of Student's physicians and CHLA.

28. On October 24, 2016, District wrote to Parents, thanking them for the medical releases and again requesting consent to the assessments. District enclosed another copy of parental procedural safeguards.

29. On November 2, 2016, Mother emailed District complaining that District should have conducted more comprehensive assessments many years ago, and revoked the consents to release of medical information.

30. On November 7, 2016, District sent Parents notice of an IEP team meeting for December 2, 2016 to discuss Student's attendance, review a private reading assessment submitted by Parents, discuss consent to District assessments, and consider parental concerns.

31. On November 9, 2016, Parents wrote to District that Student's educational needs were not new, and that District should have assessed Student earlier. Parents consented to District assessments contingent upon District performing more comprehensive assessments than proposed, using technically sound testing instruments, and using assessment tools and strategies that provide relevant information. Parents did not specify what they understood these requirements to entail. Parents reiterated that they would not consent to District observing Student outside of school, to the release of any medical information, or to contact with any of Student's home services providers, and demanded that District allow unrestricted school access to a private observer. The November 9, 2016 letter did not provide District with sufficient consent to conduct the proposed assessments.

32. On November 28, 2016, Mother wrote a letter to District that Parents would not consent to the August 31, 2016 or October 14, 2016 assessment plans until and unless District: allowed a private observer to have unrestricted access to Student's

educational setting; abandoned its request for updated medical or other records; and concurrently completed additional assessments requested by Parents in a separate letter. Parents refused to allow District to contact Student's home service providers.

33. On December 2, 2016, District convened an IEP team meeting with Mother, Student's home behaviorist, Student's teacher and service providers, and District administrators. District staff expressed concern that Student had missed 26 school days of the Fall 2016 semester, and had been late 16 times. Mother stated that she kept Student home for disability related reasons. Based on Mother's expressed distrust of District staff, District team members agreed to amend Student's IEP to offer three hours of in-home instruction by a non-public agency special education teacher for every two days of absences. However, the District team members stressed that Student needed to be in school, or he would not make consistent progress.

34. At Mother's request, the IEP team reviewed Student's 2014 toileting plan. Student's home behaviorist reported Student wore pull-ups to relieve anxiety regarding accidents, and she was working with him to transition to regular underwear and to visit the toilet more frequently. Mother reported that she refused to send Student to school in pull-ups. District continued to offer Student a one-on-one instructional assistant to address Student's toileting needs and to collect data on toileting.

35. District team members requested Mother's consent to the outstanding assessment plans and releases of medical information. Parents believed that a school district was required to conduct assessments in all areas of need every time it proposed to conduct any reassessment, and wanted assessments done in additional areas such as gross motor functioning, occupational therapy (sensory processing) and reading (dyslexia). Mother told the team that Parents would not sign the assessment plans because the plans did not meet federal requirements as they understood them, and the meeting was adjourned.

36. On December 5 and 6, 2016, Father emailed District that Student was being kept home because Student had not slept much and was having stomach problems.

37. On December 13, 2016, Mother emailed District that Student would be late or absent because he was constipated.

38. On January 19, 2017, Mother emailed District that Student was being kept home due to Student's report of stomach upset and constipation.

39. On January 24, 2017, Mother emailed District that Student was having stomach problems and would be kept home. That same day, District mailed Parents an assessment plan to conduct an assessment of Student for dyslexia.

40. On January 26, 2017, Mother emailed District that Student was being kept home because he was constipated, would not get dressed and appeared to be avoiding school.

41. Also on January 26, 2017, District mailed Parents a letter requesting consent to the August 31, 2016 and October 13, 2016 assessment plans. The letter also requested consent to the medical releases permitting District to communicate with Student's medical professionals regarding issues impacting Student's school attendance.

42. On January 30, 2017, Father emailed District that Student was being kept home because Student had not slept well the night before.

43. On January 31, 2017, Father emailed District that Student was being kept home because he had not slept well the night before and refused to eat breakfast or get dressed.

44. On January 31, 2017, Parents wrote to District that they refused to consent to District's assessment plans because, in Parents' opinion, District assessors routinely failed to recognize Student's disabilities, including dyslexia, and District had not provided adequate intervention for Student's toileting needs in the past. Parents

objected to District's observation policies, and demanded that Student's in-home behaviorist have unlimited access to Student's school and program, and that she determine Student's toileting needs and a toileting plan.

45. On February 2, 2017, Father emailed District that Parents were keeping Student home because he refused to get ready for school.

46. On February 6, 2017, District mailed a response to Parents' January 31, 2017 letter, informing them that District would convene an IEP team meeting to discuss Parents' concerns and additional assessment requests. District again asked for consent to the August 31 and October 13, 2016 assessment plans. District explained that it had made many attempts to resolve Parents' concerns, but would be filing for due process because the informal attempts had been unsuccessful. The letter included a copy of parental procedural safeguards.

47. By February 21, 2017, Student had missed 45 of 109 school days in the 2016-2017 school year, with late arrivals on 23 of the 64 days of actual attendance.

LEGAL AUTHORITIES AND CONCLUSIONS

INTRODUCTION: LEGAL FRAMEWORK UNDER THE IDEA⁴

1. This hearing was held under the Individuals with Disabilities Education Act, its regulations, and California statutes and regulations intended to implement it. (20 U.S.C. § 1400 et seq.; 34 C.F.R. § 300.1 (2006) et seq.;⁵ Ed. Code, § 56000, et seq.; Cal. Code. Regs., tit. 5, § 3000 et seq.) The main purposes of the IDEA are: (1) to ensure that

⁴Unless otherwise indicated, the legal citations in the introduction are incorporated by reference into the analysis of each issue decided below.

⁵All references to the Code of Federal Regulations are to the 2006 edition, unless otherwise indicated.

all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for employment and independent living, and (2) to ensure that the rights of children with disabilities and their parents are protected. (20 U.S.C. § 1400(d)(1); See Ed. Code, § 56000, subd. (a).)

2. A FAPE means special education and related services that are available to an eligible child at no charge to the parent or guardian, meet state educational standards, and conform to the child's IEP. (20 U.S.C. § 1401(9); 34 C.F.R. § 300.17.) "Special education" is instruction specially designed to meet the unique needs of a child with a disability. (20 U.S.C. § 1401(29); 34 C.F.R. § 300.39; Ed. Code, § 56031.) "Related services" are transportation and other developmental, corrective, and supportive services that are required to assist the child in benefiting from special education. (20 U.S.C. § 1401(26); 34 C.F.R. § 300.34; Ed. Code, § 56363, subd. (a).) In general, an IEP is a written statement for each child with a disability that is developed under the IDEA's procedures with the participation of parents and school personnel that describes the child's needs, academic, and functional goals related to those needs, and a statement of the special education, related services, and program modifications and accommodations that will be provided for the child to advance in attaining the goals, make progress in the general education curriculum, and participate in education with disabled and non-disabled peers. (20 U.S.C. §§ 1401(14), 1414(d)(1)(A); Ed. Code, §§ 56032, 56345, subd. (a).)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176, 201 [102 S.Ct. 3034, 73 L.Ed.2d 690] (*Rowley*), the Supreme Court held that "the 'basic floor of opportunity' provided by the [IDEA] consists of access to specialized instruction and related services which are individually designed to provide educational benefit to" a child with special needs. The Supreme Court revisited and

clarified the *Rowley* standard in *Andrew F. v. Douglas County School Dist.*, 580 U.S. __ (March 22, 2017) [2017 WL 1066260] (*Andrew*). It explained that *Rowley* held that when a child is fully integrated into a regular classroom, a FAPE typically means providing a level of instruction reasonably calculated to permit advancement through the general education curriculum. (*Id.*, Slip Op. at pp. 13-14, citing *Rowley*, 458 U.S. at p. 204.) As applied to a student who was not fully integrated into a regular classroom, the student's IEP must be reasonably calculated to enable the student to make progress appropriate in light of his or her circumstances. (*Andrew*, Slip Op. at p. 12.)

4. The IDEA affords parents and local educational agencies the procedural protection of an impartial due process hearing with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a FAPE to the child. (20 U.S.C. § 1415(b)(6) & (f); 34 C.F.R. § 300.511; Ed. Code, §§ 56501, 56502, 56505; Cal. Code Regs., tit. 5, § 3082.) The party requesting the hearing is limited to the issues alleged in the complaint, unless the other party consents. (20 U.S.C. § 1415(f)(3)(B); Ed. Code, § 56502, subd. (i).) Subject to limited exceptions, a request for a due process hearing must be filed within two years from the date the party initiating the request knew or had reason to know of the facts underlying the basis for the request. (20 U.S.C. § 1415(f)(3)(C), (D); Ed. Code 56505, subd. (l).) At the hearing, the party filing the complaint has the burden of persuasion by a preponderance of the evidence. (*Schaffer v. Weast* (2005) 546 U.S. 56-62 [126 S.Ct. 528, 163 L.Ed.2d 387]; see 20 U.S.C. § 1415(i)(2)(C)(iii) [standard of review for IDEA administrative hearing decision is preponderance of the evidence].) In this matter, District had the burden of proof on the sole issue decided.

REASSESSMENTS

5. School district evaluations of students with disabilities under the IDEA serve two purposes: (1) identifying students who need specialized instruction and

related services because of an IDEA-eligible disability, and (2) helping IEP teams identify the special education and related services the student requires. (34 C.F.R. §§ 300.301 and 300.303.)The first refers to the initial evaluation to determine if the child has a disability under the IDEA, while the latter refers to the follow-up or repeat evaluations that occur throughout the course of the student’s educational career. (See 71 Fed. Reg. 46,640 (Aug. 14, 2006).)

6. The IDEA provides for reevaluations (referred to as reassessments in California law) to be conducted not more frequently than once a year unless the parent and school district agree otherwise, but at least once every three years unless the parent and school district agree that a reevaluation is not necessary. (20 U.S.C. § 1414(a)(2)(B); 34 C.F.R. § 300.303(b); Ed. Code, § 56381, subd. (a)(2).) A reassessment must be conducted if the school district “determines that the educational or related services needs, including improved academic achievement and functional performance, of the pupil warrant a reassessment, or if the pupil’s parents or teacher requests a reassessment.” (20 U.S.C. § 1414(a)(2)(A)(i); 34 C.F.R. § 300.303(a)(1); Ed. Code, § 56381, subd. (a)(1).)

7. Without updated information from a reevaluation, it may be difficult to develop an educational program that would ensure a student’s continued receipt of a FAPE. (*Cloverdale Unified School Dist.* (March 21, 2012) Cal.Off.Admin.Hrngs. Case No.2012010507, 58 IDELR 295, 112 LRP 17304.)A substantial change in the student’s academic performance or disabling condition is an example of conditions that warrant a reevaluation. (*Corona-Norco Unified School Dist.* (SEHO 1995) 22 IDELR 469, 22 LRP 3205.)

8. Reassessment generally requires parental consent. (20 U.S.C. § 1414(c)(3); Ed. Code, § 56381, subd. (f)(1).) To start the process of obtaining parental consent for a reassessment, the school district must provide proper notice to the student and his or

her parents. (20 U.S.C. §§ 1414(b)(1), 1415(b)(3) & (c)(1); Ed. Code, §§ 56321, subd. (a), 56381, subd. (a).) The notice consists of the proposed assessment plan and a copy of parental procedural rights under the IDEA and companion State law. (*Id.*) The assessment plan must: appear in language easily understood by the public and in the native language of the student; explain the assessments that the district proposes to conduct; and provide that the district will not implement an IEP without the consent of the parent. (Ed. Code, § 56321, subds. (b)(1)-(4).) The school district must give the parents and/or student 15 days to review, sign, and return the proposed assessment plan. (Ed. Code, § 56321, subd. (a).)

9. Parents who want their child to receive special education services must allow reassessment if conditions warrant it. In *Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315, the court stated that “if the parents want [their child] to receive special education under the Act, they are obliged to permit such testing.” (See, e.g., *Patricia P. v. Board of Educ. of Oak Park and River Forest High School Dist. No. 200* (7th Cir. 2000) 203 F.3d 462, 468; see also, *Johnson v. Duneland School Corp.* (7th Cir. 1996) 92 F.3d 554, 557-58.) In *Andress v. Cleveland Independent School Dist.* (5th Cir. 1995) 64 F.3d 176, 178 (*Andress*), the court concluded that “a parent who desires for her child to receive special education must allow the school district to evaluate the child ... [T]here is no exception to this rule.”

10. Parents who want their children to receive special education services cannot force the district to rely solely on an independent evaluation. (*Johnson v. Duneland Sch. Corp.* (7th Cir. 1996) 92 F.3d 554, 558; *Andress* 64 F.3d at pp. 178-79; *Dubois v. Conn. State Bd. of Ed.* (2d Cir. 1984) 727 F.2d 44, 48.) A school district has the right to evaluation by an assessor of its choice. (*M.T.V. v. DeKalb County School Dist.* (11th Cir. 2007) 446 F.3d 1153, 1160.)

11. If a parent does not consent to a reassessment plan, the school district may conduct the reassessment without parental consent if it shows at a due process hearing that conditions warrant reassessment of the student and that it is lawfully entitled to do so. (20 U.S.C. § 1414(c)(3); 34 C.F.R. § 300.300(c)(ii); Ed. Code, §§ 56381, subd. (f)(3), 56501, subd. (a)(3).) Therefore, a school district must establish that (1) the educational or related services needs of the child warrant reassessment of the child, and that (2) the district has complied with all procedural requirements to obtain parental consent.

ANALYSIS

Reassessments Warranted

12. District contends that Student's increasing absences through Spring 2016, reported by Parents to result from Student's difficulty learning toileting skills, warranted a functional behavior reassessment at the beginning of the 2016-2017 school year. District further contends that subsequent reports by Parents that Student's behaviors were also a result of anxiety and worsening biological symptoms warranted assessments of Student's social, emotional and adaptive functioning, as well as a health assessment, by October 2016. Parents contend that District forfeited the right to conduct the three proposed assessments by failing to also assess in all areas of suspected need.

13. The weight of the evidence established that Student's educational needs warranted the reassessments proposed by District in the assessment plans of August 31, 2016 and October 13, 2016.

14. Dr. Ball, Ms. Kieffe and Ms. Lockwood testified credibly and corroboratively that conditions warranted, and continue to warrant, reassessment of Student in the areas of behavior, social functioning, emotional functioning, adaptive functioning, health

and developmental history. Assessments in these areas were necessary to provide comprehensive data to the IEP team to develop an appropriate IEP for Student.

15. As to the functional behavior assessment, Parents reported at the May 27 and June 1, 2016 IEP team meetings that Student was not yet toilet trained and resistant to going to school. The functional behavior assessment proposed by District, dated August 31, 2016, was intended to inform District if there was a behavioral component to that resistance, to provide District with updated information on Student's ability to recognize and address his toileting needs at school, and to assist the IEP team in developing strategies to support Student in the school environment. Student's increasing absences were adversely impacting his ability to access and understand the curriculum. Although not available to District on August 31, 2016, Parents provided District with a private behavioral assessment in September 2016 that recommended a data-driven assessment, such as a functional behavior assessment, of Student's toileting needs. Parents also demanded a data-driven toileting plan in their letter of October 3, 2016. An assessment of Student in the area of functional behavior would enable District and the IEP team to respond to Parents' concerns about Student missing school and falling behind, and to develop an appropriate IEP. It was also appropriate for the assessment to be conducted at the beginning of the 2016-2017 school year to provide data to the IEP team to develop positive behavior interventions that would support Student in the school environment. Accordingly, District reasonably determined that a reassessment of Student in the area of functional behavior was necessary in Fall 2016.

16. As to the psycho educational assessment of social, emotional and adaptive functioning, Parents requested on October 3, 2016, that District identify social, affective and environmental factors that impeded Student's learning. Student's increasing tardy attendance and absences, coupled with Parents' report that Student did not want to use the bathroom at school, informed District that there might be social, emotional or

adaptive functioning components to Student's school resistance. The psycho educational assessment proposed by District on October 13, 2016, was designed to inform District if Student had social, emotional or adaptive functioning components relative to his school resistance, to provide District with updated information on Student's social, emotional or adaptive needs in the school environment, and to assist the IEP team in developing strategies to support Student socially, emotionally and with daily living skills in the school setting. Accordingly, District reasonably determined that a psycho educational assessment of Student's social, emotional and adaptive functioning was warranted in October 2016.

17. As to the health assessment, Parents requested on October 3, 2016, that District assess the biological factors that interfered with Student's learning and sought a data-driven plan to address Student's toileting. By that time, Student had missed 10 days of school and been late nine times, which Parents reported was due not only to school resistance, but to gastrointestinal problems, possibly impacted bowels, and an inability to sleep at night. By February 2017, Parents had kept Student out of school almost 50 percent of school days for health reasons. The health and developmental history assessment proposed by District on October 13, 2016, was designed to inform District of medical issues impacting Student's ability to attend and perform in class, and to assist the IEP team in developing strategies to support Student in the school setting, taking into account Student's medical conditions. Accordingly, District reasonably determined that Student's 2014 toileting plan should be updated, that the impacts of Student's current health and development on his access to the curriculum needed to be reassessed, and that a health and developmental history assessment was warranted by October 2016.

18. Because of Student's gastrointestinal distress, difficulty with bowel movements, and chronic insomnia, District was also required to ensure that any

behavior and toileting plans developed by the IEP team did not adversely impact Student's medical issues. Ms. Lockwood's testimony established that it would have been irresponsible of District to develop a behavioral or toileting plan without a consult between the school nurse and Student's physicians regarding the impact of those plans on Student's health. Accordingly, it was also necessary for District to request parental consent to exchange information with those physicians regarding medical conditions that impacted Student's toileting and absences. Ms. Lockwood was a licensed and credentialed school nurse with experience in coordinating pediatric care, and qualified to gather the medical information from Student's physicians necessary to ensure that any plan adopted by the IEP team would not negatively impact Student's health.

19. Parents submitted no law or evidence to support Student's contention that District forfeited its right to conduct the assessments at issue because it did not also propose to conduct additional assessments requested by Parents. At hearing and in their closing brief, Parents contended that the dispute in this current due process proceeding was whether District had violated its "child find" obligations under the IDEA by failing to conduct reassessments of Student in all areas of suspected need, including gross and fine motor functioning, adapted physical education, and reading (dyslexia).⁶

⁶"Child find" refers to the duty that IDEA imposes upon states to identify, locate and evaluate all children with disabilities, including homeless children, wards of the state, and children attending private schools, who are in need of special education and related services. (20 U.S.C. §1412(a)(3)(A); Ed. Code, §§ 56171 & 56301, subds. (a) & (b).) The purpose of the child-find evaluation is to provide access to special education. (*Fitzgerald v. Camdenton R-III School District* (8th Cir. 2006) 439 F.3d 773, 776.) Since Student had already been identified as a child with a disability and offered special education and related services, the term "child find" is not apropos to his situation, and

However, although Student has a right to file a due process complaint demanding additional assessments, Student has not done so; thus the demand for additional assessments is not at issue in this due process hearing. This matter concerned the district-filed complaint to proceed with the assessments District proposed, and that is the only remaining issue raised in District's complaint. Accordingly, the issue of Parent's demand for additional assessments was not decided in the current due process proceeding.

Notice of Proposed Assessments

20. The weight of the evidence established that District properly took all necessary steps to provide Parents with notice of the proposed behavioral, psycho educational and health assessments and to obtain Parents' consent to those assessments.

21. Parents received a copy of the August 31, 2016 and October 13, 2016 assessment plans and were given 15 days to review, sign and return each of them.

22. Both assessment plans were accompanied by a copy of parental procedural rights under the IDEA and related State law, and additional copies of parental procedural rights were given to Parents in District's letters of October 24, 2016 and February 6, 2017.

23. The assessment plans appeared in a language easily understood by the public and in English, and expressly stated that no IEP would result from the assessment without parental consent. District sent the August 31 and October 13, 2016 assessment

is not the appropriate term for Parents' contention that he required additional assessments in other areas of suspected need.

plans to Parents with letters that explained why District determined that the assessments were necessary, gave additional details regarding the nature and scope of the assessments, and identified qualified assessors to conduct the assessments. All procedural requirements for obtaining Parents' consent to the proposed assessments were met.

Conditional Consent Insufficient

24. Parents also contend that they gave conditional consent to assess, and that District was required to conduct assessments pursuant to Parents' conditions. District contends that it was not required to conduct assessments subject to Parents' conditions.

25. As long as statutory requirements for assessments are satisfied, parents may not put conditions on assessments. The U.S. Department of Education, Office of Special Education Programs, which is tasked with interpretation of the IDEA and issuing guidance for its implementation, has advised that selection of particular testing or evaluation instruments is left to the discretion of State and local educational authorities. (*Letter to Anonymous* (OSEP Sept. 17, 1993) 20 IDELR 542, 20 LRP 2357; *M.W. v. Poway Unified School Dist.* (SD Cal. Aug. 14, 2013) (unpub.) citing *K.S. v. Fremont* (ND Cal., 2009) 679 F.Supp.2d 1046, 61 IDELR 250, 113 LRP 33620.) Moreover, the right to assess belongs to school districts, and parents have no right to insist on outside assessors. (See, *Andress, supra*, 64 F.3d at p. 179.) In *G.J. v. Muscogee County Sch. Dist.* (M.D. Ga. 2010) 704 F.Supp.2d 1299, affd. (11th Cir. 2012) 668 F.3d 1258), the parents purported to agree to reassessments, but attempted to require that particular assessors conduct them. The District Court affirmed a due process decision determining that consent was not given. "With such restrictions, [parents'] purported consent is not consent at all." (*Id.*, 704 F.Supp.2d at p. 1309.) In affirming, the Eleventh Circuit observed that the parents'

conditions “vitiating any rights the school district had under the IDEA for the reevaluation process....” (*Id.*, 668 F.3d at p. 1264.)

26. Parents repeatedly refused to consent to the proposed assessments of Student’s functional behavior or emotional and adaptive functioning. Their November 9, 2016 letter purported to give consent, but subject to Parents’ unexplained interpretation of conditions imposed by the IDEA and restrictions on the scope and methods used to conduct the assessments. Specifically, Parents barred District from observing Student outside of school or communicating with Student’s home behaviorists, which raised insurmountable barriers to addressing Student’s school resistance and toileting needs in the school setting. Therefore, the November 9, 2016 letter did not provide District with sufficient consent to conduct the proposed assessments.

27. Parents refused to execute the releases of information necessary for Ms. Lockwood to consult with Student’s physicians and obtain the information necessary to inform Ms. Lockwood, the other assessors, and the IEP team about medical issues that might impact Student’s educational program. Parents did not sign the releases for exchange of medical information requested by Ms. Lockwood or bring them to the IEP on October 14, 2016. Parents prepared and signed different release forms on October 17, 2016, but revoked their consent to those releases on November 2, 2016, before permission to conduct the assessments had been given. Parents reiterated that they would not consent to releases of information in the letter of November 9, 2016. Without the releases of medical information, District could not completely assess Student’s health and development, and appropriately or safely address Student’s toileting or school avoidance needs.

28. Accordingly, Parents’ written statements were less than unqualified consent to assess Student in accordance with the August 31 and October 13, 2016

assessment plans, and District properly refrained from assessing Student pending a due process decision on their right to do so.

29. In summary, District met its burden of proving by a preponderance of the evidence that reassessments of Student in the areas of functional behavior, psycho education (social functioning, emotional functioning and adaptive functioning) and health and developmental history were warranted to determine Student's educational needs at the time the August 31 and October 13, 2016 assessment plans were prepared and provided to Parents. District also proved that it had complied with all procedural requirements for obtaining parental consent to the proposed assessments. Therefore, District is entitled to assess Student pursuant to the August 31 and October 13, 2016 assessment plans, without parental consent.

ORDER

1. District is entitled to reassess Student according to its August 31, 2016 and October 13, 2016 assessment plans, without Parents' consent.

2. District shall notify Parents in writing, within 20 business days of the date of this Decision, of the days, times and places Parent is to present Student for assessment, and Parents shall reasonably cooperate in presenting him for assessment on those days and times, and in those places.

3. If Student is unable to attend school or appear for assessment on any school day during the assessments, by reason of illness or other such cause unrelated to the parties' disputes, Parents shall promptly communicate this fact to District and the parties shall mutually agree on days and times for the assessment to be conducted that are no more than 30 days from the dates that District originally proposed.

4. Parent shall timely complete and return any documents reasonably requested by District as a part of the assessments.

5. Parents shall not attempt to attach any conditions to District's assessments, including but not limited to a Parent's presence during an assessment, the methods used in an assessment, or the identity or qualifications of the person conducting an assessment.

6. If Parents do not make Student available for assessment, or do not timely complete and return any documents in compliance with this Order, District will not be obligated to provide special education and related services to Student, or otherwise to provide Student the rights of a special education student, until such time as Parents comply with this Order.

PREVAILING PARTY

Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. Here, District prevailed on the sole issue heard in this case.

RIGHT TO APPEAL THIS DECISION

This Decision is the final administrative determination and is binding on all parties. (Ed. Code, § 56505, subd. (h).) Any party has the right to appeal this Decision to a court of competent jurisdiction within 90 days of receiving it. (Ed. Code, § 56505, subd.(k).)

Dated: April 10, 2017

/s/

ALEXA J. HOHENSEE

Administrative Law Judge

Office of Administrative Hearings